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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-977

ACCURACY IN MEDIA, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,
Respondents.

BRIEF FOR RESPONDENT CORPORATION FOR PUBLIC BROADCASTING IN OPPOSITION

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OPINIONS BELOW

The Memorandum Opinion and Order of the Federal Communications Commission is reported at 43 F.C.C. 2d 851 (1973). The opinion of the court of appeals is reported at 521 F.2d 288 (D.C. Cir. 1975).

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1975. The petition for a writ of certiorari was filed on January 10, 1976. On February 2, 1976, the Clerk issued an order extending the time for

filing responses to the petition to March 2, 1976. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, pursuant to Section 396(g)(1)(A) of the Communications Act, the Federal Communications Commission has jurisdiction to require the Corporation for Public Broadcasting to maintain "objectivity and balance" in its programs, even though Section 398 expressly provides that nothing contained in Section 396 shall be deemed to authorize any agency of the United States to exercise "any direction, supervision, or control" over the Corporation.

STATUTES INVOLVED

47 U.S.C. § 396(g)(1)(A):

> In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a) of this section, the Corporation is authorized to—
>
> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature;

47 U.S.C. § 398:

> Nothing contained in sections 390-399 of this title shall be deemed (1) to amend any other provision of, or requirement under this chapter; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any discretion, supervision, or control over educational television broadcasting, or over the Corporation or any

> of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station or system.

STATEMENT

Petitioner filed complaints with the Federal Communications Commission (FCC) against the Public Broadcasting Service (PBS) alleging, *inter alia,* that two programs produced with the financial assistance of the Corporation for Public Broadcasting (CPB) and distributed by PBS to non-commercial educational television stations throughout the United States violated Section 396(g)(1)(A) of the Communications Act of 1934, as amended.[1] That provision authorizes CPB to:

> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.

In its initial consideration of the question whether the two programs contravened the objectivity and balance language of Section 396(g)(1)(A), the FCC expressed doubt that it had jurisdiction to require adherence to this standard (39 F.C.C. 2d at 420 n.1). It pointed to Section 398 of the Communications Act which provides that nothing in Sections 390-399 shall be construed "to authorize any department, agency, officer, or employee of the United States to exercise any

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[1] The complaints alleged also that the two programs violated the Fairness Doctrine. The FCC rejected this claim, and petitioner did not press it in the court of appeals.

direction, supervision or control over educational television broadcasting, or over the Corporation [for Public Broadcasting] * * * ." It invited petitioner and other interested parties to file briefs on the issue.

After full consideration, the FCC held that it lacked jurisdiction to enforce the objectivity and balance language of Section 396(g)(1)(A). In so holding, it reasoned that Congress' primary purpose in enacting Section 398 was to keep CPB free from government control, and that it would not be warranted in attempting to oversee the Corporation's activities. It pointed out further that its decision did not free public broadcasting from Fairness Doctrine supervision; and that individual noncommercial licensees were subject to the Fairness Doctrine enforced by the FCC. The FCC stated that a holding that the objectivity and balance language of Section 396(g)(1)(A) was enforceable would simply add another layer of fairness supervision.

Petitioner appealed, and CPB was permitted to intervene.[2] The court of appeals affirmed, following the FCC's reasoning, and concluding (521 F.2d at 297) that Section 396(g)(1)(A) "is not a substantive standard, legally enforceable by agency or courts," but should be taken "as a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire."

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[2] The court also permitted the following parties to intervene: The Public Broadcasting Service, The University of Maine, Lehigh Valley Educational Television Corporation, Northeastern Pennsylvania Educational Television Association, Connecticut Educational Television Corporation, State of Wisconsin—Educational Communications Board, The Board of Regents of the University of Wisconsin System, The Nebraska Educational Television Commission, The Virginia Public Telecommunications Council and Educational Broadcasting Corporation.

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

1. The issue raised here is one of first impression. It does not involve a matter of broadcast regulation, but rather the scope of the FCC's jurisdiction over CPB, an entity which by statute (Section 396(g)(3) of the Communications Act) is forbidden to own or operate "any television or radio broadcast station, system, or network, community antenna television system, or interconnection or program facility." Thus, petitioner's claim of conflict (Pet. 15) with principles of broadcast regulation established by this Court is wide of the mark.

Involving as they do principles of broadcast regulation, the cases upon which petitioner relies for conflict arise in wholly different factual contexts and, indeed, involve statutory provisions different from those in issue here. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), concerned the proper FCC procedure to determine the award of a construction permit to competing applicants for a broadcast station. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court, after noting that CATV systems were engaged in interstate commerce, upheld FCC jurisdiction over CATV as reasonably ancillary to the performance of its responsibilities for regulating television broadcasting. And in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 369 (1969), the Court affirmed the FCC's authority to enforce the Fairness Doctrine against broadcast licensees. None of these decisions conflicts in principle or otherwise with the decision below, and none bears materially on the outcome of the instant case.

2. The interpretation by the court of appeals of the relevant statutory provisions likewise affords no basis for review by this Court. Indeed, the court of appeals and the FCC reached the only conclusion they could have reached, given the explicit Congressional command that nothing in Sections 390-399 of the Communications Act should be construed to authorize any agency to exercise "any direction, supervision, or control" over educational television broadcasting or CPB. As the court of appeals explained (521 F.2d at 292), "[s]ince the FCC is obviously an 'agency * * * of the United States' and since any enforcement of § 396(g)(1)(A) would necessarily entail 'supervision' of the Corporation, the plain words of subsection (2) [of Section 398] preclude FCC jurisdiction."

This conclusion, moreover, is fully consistent with the legislative history of the statute which, as both opinions below make clear, amply demonstrates Congress' overriding concern (H.R. Rep. No. 572, 90th Cong., 1st Sess. 19 (1967)) "to remove the programming activity from governmental supervision." In the words of Congressman Staggers, the chief House spokesman for the public broadcasting legislation (113 Cong. Rec. 26384)), "No one—the administration, the Committee, the witnesses—wanted any hint of Federal control of broadcast programs to be permitted." As for petitioner's claim (Pet. 8) that the court of appeals failed to quote from the single most relevant portion of the legislative history, the Conference Report relating to Section 396(g)(1)(A), it is enough to point out that there is not a word in the passage relied upon which even remotely suggests that Congress intended the FCC or any other government agency to enforce the objectivity and balance language.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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